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Homemakers, Inc. v. Gonzalez, 400 So. 2d 965 (Fla. 1981)

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Statutes of Limitations—FLORIDA ADOPTS STRICT APPROACH TO RETROACTIVE APPLICATION—*Homemakers, Inc. v. Gonzales*, 400 So. 2d 965 (Fla. 1981)

Until recently, it was well established in Florida that legislative enlargements of statutes of limitations would be applied retroactively to persons with existing causes of action. The Florida Supreme Court, in *Homemakers, Inc. v. Gonzales*,[1] reversed that rule, holding that if the legislature enlarges a statute of limitations period, the enlargement will only be prospective "unless the legislative intent to provide retroactive effect is express, clear and manifest."[2]

The *Gonzales* opinion heralded a far-reaching and significant defeat for plaintiffs. The holding in *Gonzales*, rather than being limited to medical malpractice statutes of limitations at issue in the case, appears to be applicable to most causes of action. Plaintiffs no longer will be given the benefit of an enlarged limitation period without clearly manifested legislative intent. None of the amendments to the statute of limitations since 1974[3] appear to have the required manifestation of legislative intent,[4] thus making it difficult for plaintiffs to successfully argue that they should receive the benefit of any amendment which enlarges the limitation period when the cause of action accrued prior to the amendment. *Gonzales* is a radical shift from the approach adopted by three of the four district courts of appeal that have considered this question. This note will examine the case law and policy considerations which support the majority and dissent approaches. Additionally, this note will discuss a possible exception to the apparent broad-reaching effect of *Gonzales*.[5]

Gonzales involved an interpretation of two sections of the Florida Statutes[6] which amended the former statute of limitations for

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1. 400 So. 2d 965 (Fla. 1981).

2. *Id.* at 967.

3. The statute of limitations was amended by the following: ch. 77-174, § 1, 1977 Fla. Laws 719; ch. 78-435, § 11, 1978 Fla. Laws 1448; ch. 80-322, § 1, 1980 Fla. Laws 1389.

4. Although the court in *Gonzales* did not indicate what language would be a sufficient manifestation of retroactive legislative intent, it appears that at least a statement by the legislature that they intend the benefits of any enlarged statute of limitations period to be given to actions accrued, but not yet barred, is required.

5. The court stated, "The rule was correctly stated in *Brooks* that a statute of limitations will be prospectively applied unless the legislative intent to provide retroactive effect is express, clear and manifest." 400 So. 2d at 967.

6. Ch. 74-382, § 7, 1974 Fla. Laws 1207 reads:

> An action for professional malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence; pro-

medical malpractice actions.[7] The two-year limitation period remained unchanged in the 1974 amendment. The plaintiff, however, focused on a change in language which stated that an action for professional malpractice was now limited to persons "in privity with the professional."[8]

Gonzales alleged that she was permanently disfigured due to the negligent administration of an injection by a nurse with whom she was not in privity. The defendant's motion for summary judgment based upon the two-year statute of limitations was denied by the circuit court. The plaintiff appealed to the First District Court of Appeal,[9] arguing that the two-year statute of limitations was not applicable because its privity requirement excluded her claim and required it to be classified with actions governed by longer limitations periods.

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vided, however, that the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.

The subsequent amendment (effective May 20, 1975) provided separately for medical malpractice and also had a privity requirement. It was located at ch. 75-9, § 7, 1975 Fla. Laws 13:

(b) An action for medical malpractice shall be commenced within two years from the time the incident occurred giving rise to the action, or within two years from the time the incident is discovered, or should have been discovered with the exercise of due diligence, provided, however, that in no event shall the action be commenced later than four years from the date of the incident or occurrence out of which the cause of action accrued. An action for medical malpractice is defined as a claim in tort or in contract for damages . . . [against] any provider of health care. The limitation of actions within this subsection shall be limited to the health care provider and persons in privity with the provider of health care. . . .

The present version of the statute of limitations for medical malpractice is the same as the 1975 version listed above and still has a two year period. FLA. STAT. § 95.11(4)(b) (1979).

The savings clause, located at ch. 74-382, § 36, 1974 Fla. Laws 1207, reads:

This act shall become effective on January 1, 1975, but any action that will be barred when this act becomes effective and that would not have been barred under prior law may be commenced before January 1, 1976, and if is not commenced by that date, the action shall be barred.

7. Ch. 73-333, § 30, 1973 Fla. Laws 828 provided:

(6) WITHIN TWO YEARS.— . . . [A]n action to recover damages for injuries to the person arising from any medical . . . treatment or surgical operation, the cause of action in such case not to be deemed to have accrued until the plaintiff discovers, or through use of reasonable care should have discovered, the injury.

8. The "privity" section to ch. 74-382, § 7, 1974 Fla. Laws 1207 was added by two different amendments. The language "provided, however that actions herein shall be limited to persons in privity" was added by the Fla. CS for CS for HB 895 (1974) which was passed as amended by the House on April 16, 1974. The language "with the professional" was proposed by House Representative Papy on the House floor on April 16, 1974, and was adopted. FLA. H.R. JOUR. 330 (Reg. Sess. 1974).

9. Gonzales v. Jacksonville Gen. Hosp., Inc., 365 So. 2d 800 (Fla. 1st Dist. Ct. App. 1978), *quashed sub nom.* Homemakers Inc. v. Gonzales, 400 So. 2d 965 (Fla. 1981).

The plaintiff argued both that case law required retroactive application of subsequent amendments to a statute of limitations enlarging the time period so long as the former limitation period had not run prior to the amendment, and that the savings clause supported her argument.[10] The plaintiff asserted that both of these conditions were met. First, there would be an enlargement if the amended malpractice statute was retroactively applied to her cause of action. The action would no longer fall under the two-year limitation period for professional malpractice since she was not in privity with the nurse. Instead, the four-year limitation period of either the general negligence statute,[11] or alternatively, the general catch-all section,[12] would be applicable to her cause of action.[13] The result would be a two-year extension of time for the plaintiff to file her action. The plaintiff also demonstrated that the amendment had occurred prior to the barring of her action under the former statute of limitations. Thus, the plaintiff argued that the four-year, rather than the two-year, limitation period was applicable to her cause of action.

The First District Court of Appeal's decision, which adopted the plaintiff's arguments, was quashed by the Florida Supreme Court. The supreme court reinstated the trial court's order of final summary judgment based upon the original two-year malpractice statute of limitations.[14] In an opinion authored by Justice Adkins, the court announced a new test of retroactivity for enlarged statutes of limitations. It held that enlarged statute of limitations periods would be limited to prospective application except where there was a clear manifestation of legislative intent that the statute was to be applied retrospectively. The court made no mention of the fact that Gonzales' claim was founded on a language change in the statute that made another statute of limitations applicable to her claim. Thus, the *Gonzales* rule apparently is intended to apply to all enlarged limitation periods, whether created by a language change or a legislative enlargement of the applicable period.

The court further stated that a savings clause did not manifest the required legislative intent to make enlarged periods retroac-

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10. 365 So. 2d at 803-04.

11. Ch. 74-382, § 7, 1974 Fla. Laws 1207 provided: "(3) WITHIN FOUR YEARS.— (a) An action founded on negligence."

12. Ch. 74-382, § 7, 1974 Fla. Laws 1207 provided: "(3) WITHIN FOUR YEARS.— . . . (b) Any action not specifically provided for in these statutes."

13. 365 So. 2d at 803.

14. 400 So. 2d at 968.

tive. Rather, the savings clause applied only to those periods "*shortened* by the amended statute, and has no application where time periods remained the same or were lengthened."[15] A savings clause is a provision often placed at the end of an amendment to a statute of limitations. One portion of the clause usually delays the effective date of a statutory change so as to provide fair warning to those persons who might be affected by the change. This portion of the savings clause is commonly referred to as the "grandfather clause."[16] It is often seen on statutes other than statutes of limitations. The savings clause in a statute of limitations also often provides additional time for persons to file their cause of action if the cause of action would not be barred under the old statute.[17]

This second portion of the savings clause must indicate that the legislature intended that the statute of limitations be retroactive. For example, assume a statute of limitations was amended, shortening the limitation period from four to three years. Assume further that the amendment became effective exactly three years and one day after the plaintiff's cause of action accrued and that the plaintiff had not filed his cause of action. In this situation, if the amendment were retroactive it would apply to all claims not filed. If the amendment did not have the second portion of the savings clause, the plaintiff's cause of action would be barred when the amendment became effective because more than three years had passed since the cause of action accrued. It would fail under the new statute even though under the old statute the plaintiff still would have had 364 days to file. The savings clause is necessary to provide the plaintiff additional time to file his already accrued action. If the amendment were only prospective in nature, however, it would apply only to causes of action accruing after its effective date. The old statute of limitations of four years would still be in effect for causes of action accruing before the amendment's effective date. There would therefore be no need to give the plaintiff additional time to file the action and hence no need for a savings clause. Therefore, the additional time portion of the savings clause could only indicate that the legislature intended the amendment to be retroactive.

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15. *Id.* at 967 (emphasis in original).

16. *See* ch. 74-382, § 36, 1974 Fla. Laws 1207 which provided: "This act shall become effective on January 1, 1975. . . ."

17. *See id.* which provided: "[B]ut any action that will be barred when this act becomes effective and that would not have been barred under prior law may be commenced before Janaury 1, 1976, and if is not commenced by that date, the action shall be barred."

When an amendment with a savings clause contains both shortened and lengthened limitation periods, a new question arises. The question is whether the legislature intended the entire amendment to be retroactive or whether, because the savings clause only applies to shortened periods, only the shortened periods are to be retroactively applied.

The supreme court addressed this question and disagreed with the district court's conclusion. The district court interpreted the savings clause to mean that all accrued actions became subject to the provisions of the amendment. The statutory period newly applicable to plaintiff's claim would therefore enlarge her time to file.[18] The supreme court, however, construed the savings clause to support retroactive application of shortened statutes of limitations but not periods which were lengthened or remained the same.[19] The supreme court stated that the original purpose of the savings clause was to satisfy a constitutional mandate that the legislature allow a reasonable time to file actions which had already accrued when the legislature *shortened* a limitation period. The court then stated that the savings clause should not be construed beyond this specific purpose.[20]

The supreme court thus resolved the intercircuit conflict over whether an enlarged statute of limitations period applies retroactively,[21] holding that generally it does not. The court explicitly adopted the fourth circuit's approach in *Brooks v. Cerrato*.[22] *Brooks* provides support for the majority's position; however, it seems to be a deviation from the general rule previously recognized in Florida and other jurisdictions. The majority also cited two other cases to support its position, but they are distinguishable.

Brooks was a medical malpractice action arising from an injury which occured during surgery in 1973. The same statutes of limitations involved in *Gonzales* were construed in *Brooks*.[23] At the time

18. 365 So. 2d at 804.

19. 400 So. 2d at 967.

20. *Id.* The supreme court cited Foley v. Morris, 339 So. 2d at 215-16, to support the proposition of a constitutional mandate.

21. The first, second, and third circuits followed the approach that enlarged limitation periods were retroactive, *e.g.*, Wetmore v. Brennan, 378 So. 2d 79 (Fla. 3d Dist. Ct. App. 1979) *cert. denied*, 388 So. 2d 1119 (Fla. 1980); Mazda Motors of Am. Inc. v. S. C. Henderson & Sons Inc., 364 So. 2d 107 (Fla. 1st Dist. Ct. App. 1978) *cert. denied*, 378 So. 2d 348 (Fla.1979); Neff v. General Dev. Corp., 354 So. 2d 1275 (Fla. 2d Dist. Ct. App. 1978); whereas, the fourth district adopted the requirement of clear legislative intent, *e.g.*, Brooks v. Cerrato, 355 So. 2d 119 (Fla. 4th Dist. Ct. App.), *cert. denied*, 361 So. 2d 831 (Fla. 1978).

22. 355 So. 2d 119 (Fla. 4th Dist. Ct. App.), *cert. denied*, 361 So. 2d 831 (Fla. 1978).

23. Ch. 73-333, § 30, 1973 Fla. Laws 828; ch. 74-382, § 7, 1974 Fla. Laws 1207; and ch.

of the operation, the statute of limitations allowed two years to file the action from the time "the plaintiff discovers, or through use of reasonable care could have discovered, the *injury*."[24] The statute was amended, effective January 1, 1975, leaving the two-year limit the same, but commencing the period to "run from the time the *cause of action* is discovered or should have been discovered with the exercise of due diligence."[25] The plaintiff argued that the new amendment should apply retroactively. Because the discovery of her cause of action occurred after the discovery of the injury, in effect, the new accrual language created an enlargement of the limitation period. The plaintiff's argument that she should receive the benefit of a statute of limitations period which is enlarged by a language change is the same argument made by the plaintiff in *Gonzales*. The court held that the amendment would not be applied retroactively, notwithstanding the savings clause,[26] since the savings clause did not clearly manifest legislative intent that it be given retroactive effect. The court in *Brooks* indicated that a savings clause's grace period was a clear manifestation of legislative intent to give retroactivity to causes of action which were *shortened*, but not to those which remained the same.[27] Thus, *Brooks* is in point, supporting the majority opinion, although it was characterized by the dissent in *Gonzales* as coming from "out of the blue."[28]

The majority in *Gonzales* also cited *Foley v. Morris*[29] as support for its position. *Foley*, too, was a medical malpractice action. The plaintiff had a rubber drain left in his body during an operation performed on April 14, 1971. It was removed on September 11, 1971. The supreme court determined that the plaintiff's cause of action accrued on September 11, 1971. The statute of limitations in effect in 1971 had a four-year limitation period commencing from the date of the discovery of the injury.[30] The defendant argued that because the suit was not filed until September 17, 1974, the new statute which became effective on July 1, 1973, should be

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74-382, § 36, 1974 Fla. Laws 1207.

24. Ch. 73-333, § 30, 1973 Fla. Laws 828 (emphasis supplied).

25. Ch. 74-382, § 7, 1974 Fla. Laws 1207 (emphasis supplied). This amendment is obviously pro-plaintiff because one almost always discovers the cause of action after the injury was or should have been discovered.

26. Ch. 74-382, § 36, 1974 Fla. Laws 1207.

27. 355 So. 2d at 120.

28. 400 So. 2d at 968.

29. 339 So. 2d 215 (Fla. 1976).

30. Ch. 21892, § 1, 1943 Fla. Laws 408.

applied retroactively.[31] The new statute, which shortened the limitation period for filing an action to two years from the discovery of the injury, did not have a savings clause. The court held that the shortened statute of limitations was not to be retroactively applied.[32]

Foley does not support the majority's position because there is an important and fundamental factual difference between *Foley* and *Gonzales*. *Foley* involved an amendment which *shortened* the statute of limitations period, whereas *Gonzales* involved an amendment which enlarged the statute of limitations period.[33] The general rule of *Foley* should be limited to its particular facts (*i.e.*, shortened limitation periods). The majority in *Gonzales*, however, ignored this distinction by requiring that both types of statutory amendments must meet the same stringent test of an "express, clear and manifest" legislative intent.[34]

Additionally, *Foley* stated that where "[t]here is reasonable doubt concerning the legislative intention to provide retroactive effect to the newly added statute of limitations, § 95.11(6), . . . the benefit of this doubt should here be given to the appellant-plaintiff, whose cause of action was dismissed."[35] The majority in *Gon-*

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31. Ch. 73-333, § 30, 1973 Fla. Laws 828.

32. 339 So. 2d at 217.

33. The court in *Foley* relied on the position announced in 51 AM JUR. 2d *Limitation of Actions* § 57 (1970) to support its position of retroactivity. 339 So. 2d at 217. A further reading of that section, however, reveals that the reader is referred to an entirely different section for amendments which extend limitation periods. This section states that unless the amendatory act expressly provides otherwise, in a wide variety of causes of action the enlarged limitation periods were intended by the legislature to apply to existing causes of action not yet barred. 51 AM JUR. 2d *Limitation of Actions* § 41 (1970). This is a strong indication that there are significant differences between the way in which courts handle enlarged rather than shortened limitation periods.

34. 400 So. 2d at 967.

35. 339 So. 2d at 217 (quoting DeLuca v. Mathews, 297 So. 2d 854, 856 (Fla. 4th Dist. Ct. App. 1974)); see also Maltempo v. Cuthbert, 288 So. 2d 517 (Fla. 2d Dist. Ct. App.), *cert. denied*, 297 So. 2d 569 (Fla. 1974). Note, however, that the above listed cases all involve giving the plaintiff the benefit of the doubt when the period is *shortened*. *But see*, Glass v. Camara, 369 So. 2d 625, 627, (Fla. 1st Dist. Ct. App. 1979), which stated that there was a good reason for extending the benefits of a lengthened period to medical malpractice claimants because filing a medical mediation claim was a condition precedent. *But see*, Worrell v. John F. Kennedy Memorial Hosp., 384 So. 2d 897, 901 n.3 (Fla. 4th Dist. Ct. App. 1980), which stated:

> It is not completely clear whether *Glass v. Camara*, 369 So. 2d 625 (Fla. 1st DCA 1979), applied Section 95.11(4)(a), Florida Statutes (Supp. 1974), effective January 1, 1975, or Section 95.11(4)(b), Florida Statutes (1975), effective May 20, 1975. Although the opinion states that the later statute is being applied, the opinion quotes from the earlier 1974 statute and relies specifically on the language "that the period of limitations shall run from the time the cause of action [was] discov-

zales never addressed this consideration of a reasonable doubt concerning legislative intent.

Indeed, research into the legislation[36] which amended the statute of limitations construed in *Gonzales,* revealed that there is a reasonable doubt whether the amendment was intended to be retroactively applied. There is no indication the legislature considered this issue.[37]

If the majority was consistently applying *Foley,* then it would follow that the benefit of the doubt should be given to the plaintiff. Applying this principle to new statutes of limitations which shorten the time period would require that the new statute not be given retroactive effect where there is reasonable doubt of legislative intent. The benefit of the doubt would flow to the plaintiff so that the cause of action would not be dismissed. On the other hand, this same consideration would support retroactive effect of statutes of limitations which lengthen the time period where there is a reasonable doubt as to legislative intent. This result would also give the benefit of the doubt to a plaintiff so that the cause of

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ered or should have been discovered" which is contained in the 1974 statute [Section 95.11(4)(a), Florida Statutes (Supp. 1974)], rather than in the later 1975 statute.

Of course, Gonzales was claiming the benefit of an amendment enacted after her cause of action arose, whereas the plaintiff in *Foley* was claiming the benefit of the statute in force when the cause of action arose. Thus, the benefit Gonzales was seeking was qualitatively different from that in issue in *Foley.*

36. Fla. CS for HB 895 (1974).

37. In a House Judiciary Committee Meeting the committee discussed the reason for the grandfather provision of the savings clause. The section of the tape which may have included a discussion of the effect of enlarging the period is so garbled that it is unclear whether the committee even discussed this issue. Fla. H.R. Committee on Judiciary, tape recording of proceedings (March 19, 1974) (on file in Florida Archives).

Mr. McFerrin Smith, former Executive Director of the Law Revision Council, attended all of the committee meetings regarding Fla. H.B. 895 and at no time was he aware of any committee discussion on the effect of enlarging the statute of limitations period. Phone conversation with the author (August 20, 1981), (record on file, FLA. ST. U.L. REV. library). In addition, research of the Senate Judiciary Committee revealed the purpose behind the vast revamping of the statute of limitations. During a meeting of the Committee, a Senator inquired into the purpose of the changes. The response was "what we did there Senator was, one of the purposes of this was, the old statute of limitations has quite a few different categories of time periods, and there was an effort to consolidate those into a fewer number of time periods, so many of these changes were accomplishing that result." Fla. S., Committee on Judiciary, tape recording of proceedings (May 13, 1974) (on file in the Florida Archives). In attendance were Senators Scarborough, Gillespie, Gruber, McClain, Weber, and Wilson. In addition, McFerrin Smith, Executive Director of the Law Revision Council was in attendance. Senator Johnston's attendance record was not marked. If the purpose of the changes were for consolidation and efficiency reasons rather than specifically to change the limitation periods, then this would be further support for the proposition that there was reasonable doubt as to legislative intent regarding retroactivity.

action would not be dismissed. Exactly the opposite result was reached in *Gonzales*. The court, in effect, applied the reasoning in *Foley* to the entirely different factual situation of *Gonzales*.

The third case which the majority in *Gonzales* cited as support for its position is *Carpenter v. Florida Central Credit Union*.[38] The majority cited this case to support its contention that a savings clause is irrelevant as a manifestation of legislative intent for periods which were enlarged or remained the same. *Carpenter* involved a suit on a promissory note. The statute of limitations for contract actions founded on written instruments was changed between the time of the default and the filing of the action. The twenty-year statute of limitations[39] was shortened to a five-year period,[40] and the amending statute had a savings clause.[41] The court held that "[t]he very nature of a savings clause imparts retroactivity upon the statutes within its ambit"[42] and "[s]ections 95.11(2)(b) and 95.022, Florida Statutes (1975), are retrospective in nature and constitutional as applied to promissory notes under seal."[43] This holding is consistent with both pre-*Gonzales* and post-*Gonzales* case law because it involves a shortened statute of limitation period. The holding is also consistent with the *Gonzales* dissent if one ignores the distinction between enlarged and shortened limitation periods, as did the majority in *Gonzales* when it applied the concern of forfeitures resulting from a shortened period to a lengthened statute of limitations period.

The majority in *Gonzales*, however, relied upon dicta in *Carpenter* to support the contention that a savings clause does not manifest legislative intent of retroactivity for statutes which either lengthen or retain time periods previously provided. If one accepted the citation to *Brooks* in *Carpenter*[44] as approval of the

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38. 369 So. 2d 935 (Fla. 1979).

39. Ch. 21892, § 1, 1943 Fla. Laws 408 provided: "WITHIN TWENTY YEARS.— An action upon a judgment or decree of a court of record in the State of Florida, and an action upon any contract, obligation, or liability founded upon an instrument of writing under seal."

40. Ch. 74-382, § 7, 1974 Fla. Laws 1207 provided: "WITHIN FIVE YEARS.— . . . A legal or equitable action on a contract, obligation or liability founded on a written instrument."

41. Ch. 74-382, § 36, 1974 Fla. Laws 1207.

42. 369 So. 2d at 937 (citing Nash v. Asher, 342 So. 2d 1038, 1039 (Fla. 4th Dist. Ct. App. 1977)) *Nash* was overruled in Garofalo v. Community Hosp. of South Broward, 382 So. 2d 722 (Fla. 4th Dist. Ct. App. 1980).

43. 369 So. 2d at 938.

44. 369 So. 2d at 937 stated, "*see Brooks v. Cerrato*, 355 So. 2d 119, 120 (Fla. 4th DCA 1978) ('[T]he grace period allowed [in § 95.022] clearly pertains to causes of action which

Brooks decision, then the adoption of that approach in *Gonzales* might have been predictable.[45] But the text of *Carpenter* never discussed the issue as applied to lengthened periods because the facts only involved a shortened period.

Apart from this questionable extension of dicta, it appears that the majority's position in *Gonzales* is supported by very little case law. The court never discusses the policy concerns behind its position, nor does it attempt to distinguish the extensive case law that the dissent uses to support its position.

The dissent's position in *Gonzales* is that plaintiffs should receive the benefit of extended statutes of limitations provided their causes of action were not barred prior to the statutory amendment. Justice England, with Chief Justice Sundberg concurring, stated that such an approach was well accepted in Florida "until the Fourth District Court of Appeal, out of the blue, applied the retroactivity concerns of shortened statute cases to an extended statute case."[46] The dissent criticized the *Gonzales* opinion for rejecting the prevailing view and adopting the minority position. The dissent then presented a rather impressive, although incomplete, list of cases which supported its position.[47]

Justice England cited two supreme court cases involving worker's compensation as support for his position. In *Corbett v. General Engineering & Machinery Co.*,[48] the statute regarding the filing of an original worker's compensation claim was amended. The limitation period was enlarged from one to two years. The supreme court stated that the amendment was silent as to whether it would apply to claims then in existence because it did not contain a savings clause. Notwithstanding the lack of a savings clause, the court held that an enlargement of a statute of limitations was to be applied to benefit the plaintiff.[49] *Garris v. Weller Construction*

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were shortened by the amended statute.')." *Brooks* allows retroactive application of enlarged statutes of limitations periods only if there is a clearly manifested legislative intent of retroactivity.

45. Justice Adkins' position has remained consistent as he authored both *Carpenter* and *Gonzales*. Justice Sundberg and Justice England dissented in *Gonzales*, disagreeing with the adoption of the *Brooks* approach. Justice Sundberg's position has also remained consistent because in *Carpenter* he concurred only in the result. His disagreement with the majority's analysis in *Carpenter* must have been, in part, with the citation to *Brooks*. On the other hand, Justice England concurred in *Carpenter*. Thus, his dissent in *Gonzales* to the adoption of the *Brooks* approach was less predictable.

46. 400 So. 2d at 968.

47. *Id.*

48. 37 So. 2d 161 (Fla. 1948).

49. *Id.* at 162.

Co.[50] involved changes in the time period for filing a request for modification of a worker's compensation award. The old statute provided for a two-year period commencing from the date of the injury or the last payment of compensation benefits.[51] The first statutory change increased the limitation period to three years.[52] The second statutory change shortened the limitation period to two years, but added the language "or after the last payment of medical benefits."[53] Neither change had a savings clause. The plaintiff, however, received medical benefits longer than he received compensation payments. The result was that if the second statutory change were retroactive it would extend his filing period so that his action would not be barred. Although the *Garris* court noted that this case was "somewhat unusual in that the postponement of consideration of the 1955 claim resulted from the request of the employer's insurance carriers,"[54] the case did explicitly support the *Gonzales* dissent's position on retroactivity.[55]

These two cases strongly support the dissent's position. Not only was the supreme court willing to apply the enlarged statutes retroactively in the absence of savings clauses, but the court indicated either explicitly or implicitly that retroactive application of an enlarged period was not even considered retroactive legislation.[56]

While these cases are theoretically distinguishable from *Gonzales* due to the traditionally liberal construction granted to worker's compensation cases,[57] the court in *Gonzales* made no attempt to

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50. 132 So. 2d 553 (Fla. 1960).
51. Ch. 23908, § 1, 1947 Fla. Laws 569.
52. Ch. 29778, § 4(1), 1955 Fla. Laws 462.
53. 132 So. 2d at 555.
54. *Id.*
55. *Id.* at 555-56:

> The rule is well established that if an amending statute lengthens the period for filing a claim allowed by an existing statute, prior to the expiration of the period allowed by such existing statute, then the amending statute will be applicable to a pending claim. If a claim has not been barred when an amending statute lengthens the time within which it must be asserted, then the claimant gets the benefit of the extended period.

See also, Walter Denson & Son v. Nelson, 88 So. 2d 120, 122 (Fla. 1956), "Here, again, it appears to us that the better-reasoned rule is that if the period allowed by an existing statute has not run when the amending statute takes effect, then if the amending statute lengthens the period allowed, it will be applicable to a pending case."

56. *Corbett,* 37 So. 2d at 162; *Garris,* 132 So. 2d at 556, (citing Walter Denson & Son v. Nelson, 88 So. 2d 120 (Fla. 1956); Corbett v. General Engineering and Machinery Co., 37 So. 2d 161 (Fla. 1948)).

57. In his dissent in Mazda Motors of Am., Inc. v. S.C. Henderson & Sons, 364 So. 2d 107 (Fla. 1st Dist. Ct. App. 1978) *cert. denied,* 378 So. 2d 348 (Fla. 1979), Judge Boyer criticized retroactive application of an extension of a limitation period for property damage.

make such a distinction. This does not, however, foreclose the possibility of the court recognizing worker's compensation cases as an exception to the apparently broad reaching effect of *Gonzales*.

It is arguable that enlarged statutes of limitation in worker's compensation cases can be applied retroactively without a clear manifestation of legislative intent. The legislature is normally required to clearly manifest its retroactive intent for enlarged limitation periods. Notwithstanding the general situation, since worker's compensation cases have traditionally been given more liberal construction, these cases should be an exception. Such an approach would lend consistency to the *Gonzales* opinion.[58] Based upon this argument, *Gonzales* would be seen as the general rule, with worker's compensation cases as the exception.

The *Gonzales* dissent also cited a number of Florida district court cases which support its position. These cases involved causes of action other than worker's compensation claims. *Neff v. General Development Corp.* was an action based upon the negligent performance of electrical work.[59] The change in the statute of limitations was an enlargement. The amendment occurred during the same statutory revision and was subject to the same savings clause[60] as the one construed in *Gonzales*. *Neff* clearly supports the dissent's position. The *Neff* opinion never mentioned the savings clause as the reason for retroactive application of the statute. This is significant because it indicates that no legislative intent of retroactivity for enlarged limitation periods is necessary. In addition, the court stated that "[a]bsent a legislative mandate to the contrary it is the enlarged limitation period which is applicable to mature causes of action not otherwise barred prior to the effective date of the longer period."[61] The district court would only recognize an express statement to the contrary as a basis for preventing the retroactive application of enlarged limitation periods. This is the exact converse of the *Gonzales* test, which requires express retroactive intent for enlarged limitation periods.

Patterson v. Sodders involved the statutory time period for

"Appellant relies upon three cases involving workmen's compensation claims, an area of the law which has traditionally received liberal consideration by the legislature and courts alike." 364 So. 2d at 109 (Boyer, Acting C.J., dissenting) (citations omitted).

58. However, there is another Florida Supreme Court case, Ruhl v. Perry, 390 So. 2d 353 (Fla. 1980), which is not a worker's compensation case but which also adopts the dissent position. *See* notes 74-79 *infra* and accompanying text.

59. 354 So. 2d 1275, 1276 (Fla. 2d Dist. Ct. App. 1978).

60. Ch. 74-382, § 36, 1974 Fla. Laws 1207.

61. 354 So. 2d at 1276 n.1 (citation omitted).

filing a request for support in a paternity proceeding.[62] The statutory period, which commenced from the date the child was born, was increased from three[63] to four[64] years. The amendment did not contain a savings clause. The defendant argued that the trial court erred in applying the four-year statute of limitations period because the change occured *after* the child's birth.[65] The district court held that the four-year period was applicable.[66] This case supports application of enlarged statute of limitations even though the statutory change does not include a savings clause.

In *Martz v. Riskamm*,[67] the statutory period for filing a dower interest claim, which is closely analogous to a statute of limitations,[68] was extended. The old statute required a filing "nine months after the first publication of notice to creditors or three years after death of her husband, whichever first occurs."[69] The amended statute deleted the three year cap provision.[70] There was no publication of notice to creditors in *Martz*. The court held that the extended statutory period was to be applied retroactively because the statutory period had not run prior to the amendment.[71] Furthermore, the court adopted this position even though the amendment was "silent as to whether it would apply to claims then in existence"[72] and did not contain a savings clause.

The dissent's position on retroactivity is well supported. Although not mentioned in *Gonzales*, there are several other district court cases which support the dissent's position.[73] In addition, as late as November 1980, the Florida Supreme Court was still recog-

62. 167 So. 2d 789, 790 (Fla. 2d Dist. Ct. App. 1964).
63. Ch. 21892, § 1, 1943 Fla. Laws 408.
64. Ch. 59-188, § 1, 1959 Fla. Laws 330.
65. 167 So. 2d at 790.
66. *Id.* at 790-91.
67. 144 So. 2d 83 (Fla. 1st Dist. Ct. App. 1962).
68. *Id.* at 88.
69. Ch. 57-408, § 1, 1957 Fla. Laws 952.
70. Ch. 59-123, § 1, 1959 Fla. Laws 224.
71. 144 So. 2d at 87-88.
72. *Id.* at 88.
73. *E.g.*, Birnholz v. Steisel, 394 So. 2d 523, 524-25 (Fla. 3d Dist. Ct. App. 1981) (statute of limitations extended from three to four years by an act which had a savings clause); Wetmore v. Brennan, 378 So. 2d at 81 (suit on a promissory note and extension of a statute of limitation by an amendment to language concerning computation of when the cause of action accrued); Glass v. Camara, 369 So. 2d 625, 627 (Fla. 1st Dist. Ct. App. 1979) (allowing extension of statute in a wrongful death action, noting that the condition precedent of medical mediation influenced the court's decision); Robinson v. Johnson, 110 So. 2d 68, 70 (Fla. 1st Dist. Ct. App. 1959) (worker's compensation case involving both an enlarging and a shortening of a limitation period).

nizing retroactive application of statutes of limitations which were extended by amendments to a substantive portion of the statute.

In *Ruhl v. Perry*[74] the supreme court analyzed the changes in limitation periods for a note under seal. The old statute provided a twenty-year period.[75] The first amendment, which occured during the same statutory revision as the amendment in *Gonzales*, lessened the statutory period to five years.[76] The amendment included a savings clause.[77] During the savings clause's grace period, the legislature again amended the statute by changing the language which determined when the cause of action accrued. This change in the determination of accrual was from "the date of issuance of the note" to "when the first written demand was made."[78] This amendment, as applied to the particular facts in *Ruhl*, enlarged the statutory period because there was no written demand. The court held that this amendment would be retroactively applied.[79]

It is difficult to reconcile *Ruhl* with *Gonzales*. One possible explanation of the discrepancy is that instead of *Gonzales* being the general rule, it is the exception. Although the *Gonzales* opinion contains no language indicating that the holding is limited to medical malpractice actions, one can speculate that the particular concerns surrounding medical malpractice might qualify these actions as an exception to the general rule of retroactive application of enlarged limitation periods. It can be argued, for example, that professional malpractice is distinguishable from other claims since the professionals' reputations and livelihoods are often at stake. Thus, the court may be less inclined to extend limitation periods for malpractice claims.

The medical field is also an area fraught with extremely high insurance rates. These rates increase the cost of services to all patients. Thus, the court's focus in the medical malpractice area might be a more attenuated version of the same goal achieved by the worker's compensation cases. In worker's compensation cases, the goal is to construe the statute most favorably toward the worker so that injured workers receive the greatest benefit. The court's focus in medical malpractice actions, however, may be not

74. 390 So. 2d 353 (Fla. 1980).

75. Ch. 21892, § 1, 1943 Fla. Laws 408.

76. Ch. 74-382, § 7, 1974 Fla. Laws 1207.

77. Ch. 74-382, § 36, 1974 Fla. Laws 1207. Based upon prior law and the *Gonzales* opinion, this shortened statute would be retroactive in effect.

78. Ch. 75-234, § 1, 1975 Fla. Laws 678.

79. 390 So. 2d at 356.

only the injured plaintiff, but patients in general. Therefore, the court, in achieving its goal of spreading costs might feel that keeping insurance rates low and stabilizing medical costs is preferable to compensating a small number of injured plaintiffs who would benefit from enlarged limitation periods.

A more cynical and perhaps more realistic explanation of why *Gonzales* could be an exception to the general rule of retroactivity of enlarged limitation periods is that the court was primarily concerned with the effect of high insurance rates on medical professionals. In any event, it is possible that *Gonzales* stands for the proposition that with certain types of causes of action, an exception to the general rule of retroactivity exists.

It appears that the dissent's position in *Gonzales* is supported by the weight of Florida case law. The dissent, however, never fully discussed the policy considerations behind its approach, other than to state that the Fourth District "applied the retroactivity concerns of shortened statute cases to an extended statute case."[80]

The basic premise of a statute of limitations is that all causes of action and potential liabilities must eventually come to an end.[81] Underlying this premise is a philosophy relating the two concepts of notice and fairness. Notice requires that a plaintiff be sufficiently aware of the length of time in which she has to determine whether to seek legal redress. On the part of the defendant, notice requires that he be aware of the time length of his exposure to potential liability. Fairness requires that the length of time for filing an action should not be changed to either party's detriment.

These concepts, as applied to an amendment which shortens a statute of limitation, mandate that the amendment not function retroactively. First, one can view the equities from the plaintiff's perspective. If a plaintiff relies upon a specified period of time to file an action, then the notice concept requires that the time period should not be summarily terminated.[82] Fairness also requires nonretroactive application of the statute of limitations. The plaintiff would be deprived of a valuable right if her cause of action was

80. 400 So. 2d at 968.

81. Employers' Fire Ins. Co. v. Continental Ins. Co., 326 So. 2d 177, 181 (Fla. 1976). *See also,* Nardone v. Reynolds, 333 So. 2d 25, 36 (Fla. 1976), stating that "[t]he purposes of the statutes of limitations are to protect defendants against unusually long delays in filing of lawsuits and to prevent unexpected enforcement of stale claims concerning which interested persons have been thrown off guard for want of reasonable prosecution."

82. This is one reason why in Florida there is a constitutional mandate that a statute of limitation which shortens the time period contain a savings clause. *Gonzales,* 400 So. 2d at 967.

summarily terminated. From the defendant's perspective, nonretroactive application of a shortened statute of limitations does not violate the concepts of fairness nor notice. The defendant's initial perception of the length of his potential liability would continue to be accurate. The defendant would not be detrimentally affected by the nonretroactive application of a shortened statute of limitations, but rather he would simply not receive the benefit of the shortened time period. The application of these concepts to a shortened statute of limitations results in the conclusion announced by the case law in Florida: shortened statutes of limitation are not retroactive in effect unless there is an express, clear manifestation of legislative intent of retroactivity and a savings clause.[83]

Applying the concepts of notice and fairness to an enlarged statute of limitations period also initially appears to require that the statute not be given retroactive effect. The concept of notice from the plaintiff's perspective would not be violated by the nonretroactive application of an enlarged time period. The plaintiff's initial perception of the time period in which her cause of action must be filed would remain the same. The concept of fairness would not be violated if the plaintiff did not benefit from the enlarged period. From the defendant's perspective, both the notice and fairness concepts could be violated by reviving risks of liability if an enlarged statute of limitations period was retroactive in application. An increase in the length of the defendant's potential liability would be unfair to him. In addition, the concept of notice might also be violated in that the defendant would have justifiably relied on the initial determination of the length of his liability. Most courts, however, have indicated that the notice concept is irrelevant as a policy consideration when applied to the defendant. Courts have addressed the notice issue by stating that a defendant does not have a vested right in a statute of limitations until it has run.[84] The conclusion is that the defendant has no right to be free from potential liability and therefore enlarged statutes of limitations can be retroactive in effect.

In summary, the policy considerations are inconclusive in decid-

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83. *Id.*

84. *E.g.*, Corbett v. General Eng'r. & Mach. Co., 37 So. 2d 161, 162 (Fla. 1948), states that "a statute of limitations enlarging the time within which an action may be brought as to pending cases is not retroactive legislation and does not impair any vested right"; 51 AM JUR. 2d *Limitation of Actions* § 40 (1970) states that "the general principal [is] that a person has no vested right in the running of a statute of limitations unless it has completely run and barred the action." (Citations omitted).

ing the question of retroactive aplication of enlarged statutes. Policy arguments can be made both for and against retroactivity.

In conclusion, the Florida Supreme Court announced a new rule for retroactive application of amendments to a statute of limitations which enlarges the existing limitation period. Whether the rule announced in *Gonzales* applies to all causes of action or whether it is limited to medical malpractice actions is unclear. The existence of inconsistent opinions indicates that the rule in *Gonzales* might be limited in the future to medical malpractice actions. Thus, plaintiffs seeking to avoid the *Gonzales* rule will argue that their actions are analogous to a worker's compensation case or a contract action rather than a medical malpractice cause of action. Therefore, under a conflicting line of cases, they should be given the benefit of an enlarged period. On the other hand, the broad, unqualified language of *Gonzales* indicates that the court intends it to apply to all causes of action. This approach seems the most likely.

None of the amendments to the statute of limitations since 1973 contain any express, clear manifestation by the legislature that enlargements are to be retroactive,[85] therefore under the broad interpretation of *Gonzales* plaintiffs will not receive the enlarged period. One example of an enlargement which would not be retroactive under the broad interpretation of *Gonzales* is the 1980 amendment to section 95.11(3)(c)[86] of the Florida Statutes regarding actions founded on design, planning or construction of an improvement to real property. The amendment extended the cap provision from twelve to fifteen years. Under the broad interpretation of *Gonzales,* plaintiffs whose causes of action accrue prior to July 2, 1980, the effective date of the statute, will not be able to take advantage of the three-year extension. Only further development of the case law will clarify whether the new rule established in *Gonzales* is to be applied broadly or narrowly.

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85. The statute of limitations was amended by the following: ch. 75-9, § 7, 1975 Fla. Laws 13; ch. 77-174, § 1, 1977 Fla. Laws 719; ch. 78-435, § 11, 1978 Fla. Laws 1448; ch. 80-322, § 1, 1980 Fla. Laws 1389.

86. (Supp. 1980).

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